United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

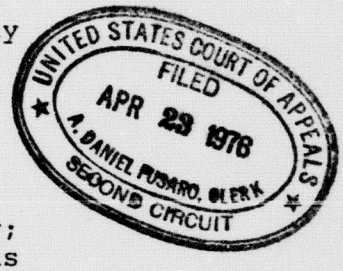
No. 76-7096

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

BETH L. NAPRSTEK, a minor, by her mother and next friend, BARBARA C. NAPRSTEK; BARBARA C. NAPRSTEK ON her own behalf; DANE LATHAM, a minor, by his father and next friend, RON LATHAM; RON LATHAM on his own behalf; JOY MASSEY, a minor, by her father and next friend, THOMAS MASSEY; THOMAS MASSEY on his own behalf; JAMES A. ROBINSON, a minor, by his mother and next friend, JUANITA Y. ROBINSON; JANINE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; LYNNE ROBINSON, a minor, by her mother and next friend, JUANITA Y. ROBINSON; JUANITA Y. ROBINSON on her own behalf; all of the foregoing individually and on behalf of all others similarly situated,

No.76-7096



Plaintiffs-Appellants,

- v -

The CITY OF NORWICH, an incorporated municipality; FREDERICK B. MIRABITO, in his official capacity as Mayor of the City of Norwich; EDWARD J. LEE, in his official capacity as Attorney for the City of Norwich; IRAD S. INGRAHAM, in his official capacity as District Attorney for the County of Chenango; JACK C. SACKETT, in his official capacity as Chief of Police of the City of Norwich,

Defendants-Appellees.

On Appeal from the

United States District Court

for the

Northern District of New York

BRIEF FOR APPELLANT

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JURISDICTION

In this civil rights action, plaintiffs challenge, as unconstitutional on its face, the juvenile curfew ordinance of the City of Norwich in the State of New York. Subject matter jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331(a) and 1343(3) and (4) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201,2202. This is to certify that this is an appeal from a final judgment in accordance with 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in applying the doctrine of abstention and refusing to decide this case on the merits.
2. Whether the curfew ordinance of the City of Norwich is unconstitutional on its face.
3. Whether the curfew ordinance of the City of Norwich is unconstitutional as applied to plaintiffs because it infringes on fundamental rights without adequate justification.

STATEMENT OF THE CASE

This is an appeal from a decision rendered by Judge Floyd F. MacMahon of the United States District Court for the Northern District of New York. Plaintiffs challenged as unconstitutional the juvenile curfew ordinance of the City of Norwich, State of New York, of which defendants are officials. Plaintiffs brought this action on their own behalf and on behalf of their infant children. They sought declaratory and injunctive relief against enforcement of the statute under the Civil Rights Act, 42 U.S.C. §1983, 28 U.S.C. §1343, and under the Declaratory Judgment Act, 28 U.S.C. §§2201,2202.

On a motion for summary judgment by plaintiffs the court dismissed the action against the defendant City of Norwich, and denied plaintiffs' motion for summary judgment on the basis of the abstention doctrine. Plaintiffs are appealing only that part of the decision which denied their motion for summary judgment.

At issue in this suit is the constitutionality of a curfew ordinance of the City of Norwich, New York, which forbids all children under the age of seventeen to be upon the streets or in any public places or buildings of the city for any reason after eleven o'clock in the evening Sunday, Monday, Tuesday, Wednesday and Thursday, and twelve midnight on Friday and Saturday, unless accompanied by the parent, guardian or other adult person having care and custody of the minor. Such adults are forbidden by the terms of the ordinance to permit children under the age of seventeen years to be unescorted

in the public areas of Norwich after the hours indicated above. The ordinance provides no exceptions to its terms. A parent, guardian or relative violating the provisions of the ordinance is subject to a fine of not more than twenty-five dollars for each violation. (See addendum)

Norwich is a city of approximately nine thousand persons located in rural Chenango County, New York. It has no appreciable crime problem and no significant incidence of juvenile crime. Arrests have been made under the terms of this curfew ordinance, and the parents of minors violating the ordinance have been fined. Plaintiffs are all either minors under the age of seventeen years or parents of such minors, all residents of Norwich.

Minor plaintiffs wish to exercise their First Amendment rights at will in the streets and public places of Norwich, but are prevented from so doing by the terms of the curfew ordinance. Adult plaintiffs wish to exercise their discretion in supervising the reasonable night time activities of their children, yet find themselves prevented from so doing by the threats of fines and arrest posed by the curfew ordinance and the enforcement policies of defendants.

I. THE DISTRICT COURT ERRED IN APPLYING THE DOCTRINE OF ABSTENTION AND REFUSING TO DECIDE THIS CASE ON THE MERITS.

It is clear that a federal court should invoke the doctrine of abstention only for the most compelling of reasons. As the Supreme Court has stated:

> We have repeatedly warned...that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in "special circumstances..." Harris County Comm'r's v. Moore, 420 U.S.77,83 (1974); see also Lake Carriers' Association v. MacMullan, 406 U.S.507,509 (1972); Zwickler v. Koota, 389 U.S.241,248 (1967).

In deciding to abstain in the instant case, the court below indicated that the vagueness of the ordinance in question called for a construction by a state court which would make certain the meaning of the ordinance, and modify the constitutional issues presented. Opinion of MacMahon, District Judge at 5, hereinafter cited as Opinion.

The court below also noted that the abstention doctrine avoids premature and unnecessary decisions. Although finding the prohibition contained in the curfew ordinance "simple", the court below chose to leave to the state courts the resolution of "unsettled questions of state law." Opinion at 4,5.

The only unresolved question of law found by the court below, however, was the omission from the ordinance of an hour at which the curfew's prohibition would end. Opinion at 5.

Appellants contend that no possible interpretation by a state or federal court could supply such a termination hour, and that even if it could, major questions of federal constitutional dimension would still remain. It consistently has been appellants' argument that every aspect of the ordinance infringes upon federal constitutional rights, and not merely that the lack of a termination hour renders the ordinance objectionable.

It has been well established that when no possible interpretation of a challenged law by a state court will eliminate the federal constitutional questions presented, the federal court should not abstain. Kusper v. Pontikes, 414 U.S.51,54 (1973); Wisconsin v. Constantineau, 400 U.S.433,440 (1971); Zwickler v. Koota, 389 U.S. 248,252 (1967); Chemical Specialties Mfrs. Ass'n. v. Lowery, 452 F.2d 431,433 (2nd Cir.1971); 1A MOORE'S FEDERAL PRACTICE 2109 (1959, Supp.,1975); WRIGHT, LAW OF FEDERAL COURTS, 197 (1970,Supp.1972).

The Supreme Court has said:

> Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Zwickler v. Koota, supra, ; Harman v. Forssenius, 380 U.S. 534,535 (1965).

Where a state law appears to be unclear, this court consistently has approved of abstention only where a state court interpretation was necessary and would avoid or modify a question of federal law. See Chemical Specialties Mfrs. Ass'n Inc. v. Lowery, supra ; Coleman v. Ginsberg, 428 F.2d 767(2nd Cir.1970); Blouin v. Dembitz,

489 F.2d 488 (2nd Cir.1973); Reid v. Board of Education of City of New York, 453 F.2d 238(2nd Cir.1971); Escalera v. New York Housing Authority, 425 F.2d 853(2nd Cir.), cert. denied, 400 U.S.853 (1970); Holmes v. New York Housing Authority, 398 F.2d 262(2nd Cir.1968); Weiss v. Duberstein, 445 F.2d 1297(2nd Cir.1971).

Abstention has been considered singularly inappropriate where, as in the case at bar, the claim is that civil rights and liberties have been violated. Dombrowski v. Pfister, 380 U.S.479, 489-492(1965); Zwickler v. Koota, supra; See Coleman v. Ginsberg, supra, at 769. The Supreme Court has held the abstention doctrine inappropriate for cases where "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, supra, at 489-490.

> It is readily apparent that abstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where...the conduct ...is not within the reach of an acceptable limiting construction. Dombrowski v, Pfister, 380 U.S. 479, 491 (1965).

After analyzing the line of Supreme Court cases involving the abstention doctrine one noted commentator has summarized the principles which have evolved:

> 1. If it is clear on its face that a statute is either valid or void, the federal court should give a declaratory judgment to this effect.
>
> 2. If the statute is unclear on its face, but a single state court decision can remove its ambiguities and may avoid the constitutional question, the federal court should abstain...

3. If the statute is unclear on its face, and rights of free expression will be inhibited as citizens await the series of state court decisions that would be needed to define its contours, abstention is inappropriate... WRIGHT, LAW OF FEDERAL COURTS, supra, at 207,208

Appellants submit that in view of the "simple" nature of the prohibition contained in the City of Norwich curfew ordinance and the unavoidable necessity of an interpretation of the ordinance's effect on federal constitutional rights, the abstention doctrine was applied incorrectly. The ordinance in the case at bar is clearly invalid on its face because as the Opinion pointed out,

> Although purporting to define the period within which a minor's use of the streets is restricted, the ordinance fails to include the time when the curfew is terminated. Opinion, supra, at 5.

II. THE CURFEW ORDINANCE IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS VAGUE AND OVERBROAD.

The right to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution includes the basic requirement that fair notice must be provided if conduct is to be made criminal and punishable. Implicit in this notice guarantee is the rule that statutes and ordinances must be drafted in language sufficiently clear and explicit that persons of reasonable intelligence can know what conduct is prohibited or required and can act accordingly. Coates v. City of Cincinnati, 402 U.S.611(1971); Papachriston v. City of Jacksonville, 405 U.S.156(1972).

In the case before this Court, the mere presence of a minor in a public place constitutes an offense which leads to the arrest of the minor and the levying of a fine against the parent. The ordinance does not attempt to define criminal conduct according to the terms of any offense or crime recognized in the criminal laws of the State of New York. The intent and effect of the ordinance is not to prevent criminal conduct, but to prevent the night time exercise by minor plaintiffs of their right to use the streets and public places of Norwich unaccompanied by an adult. All such use is made criminal, no matter how innocent, reasonable, or even necessary. Indeed, because the ordinance merely states an hour after which a minor's presence in a public place is deemed to be illegal, a minor arising at an early morning hour does so at his or her own risk. Six or seven o'clock in the morning might be considered by a police

officer to be "after" the curfew hours of eleven o'clock in the night or twelve o'clock midnight. For example, a minor with an early morning newspaper delivery route goes about the job at his or her peril.

The Hayes v. Municipal Court of Oklahoma City, 487 P.2d, 974(Okla.Crim.1971), an ordinance was held unconstitutionally vague and overbroad which prohibited loitering or wandering without a lawful purpose on public streets by persons under sixteen. The court held that the ordinance was constitutionally invalid because it proscribed conduct which was completely innocent and invaded the rights of privacy and freedom of movement. Similar reasoning was used by the Supreme Court of Washington in Seattle v. Pullman, 82 Wash. 2d 794, 514,P.2d 1059(1973), which held invalid a juvenile curfew ordinance on the grounds that it was vague by due process standards and beyond the police powers of the municipality since it made no distinction between harmful and innocent activity. Accord Seattle v. Drew, 70 Wash.2d 405,423 P.2d 522(1967).

The danger with such vague and overbroad ordinances is not only their failure to give fair notice of proscribed conduct, but also their vulnerability to arbitrary and selective enforcement. The loitering provision of the New York State Penal Law §240.35(6) was declared invalid for this reason in U.S. ex rel.Newsome v. Malcolm, 492 F.2d 1166(2nd Cir.1974). The court noted that if a statute does not provide sufficient guidelines for enforcement, then it may:

> ...lend itself to the abuse of pretextual arrests of people who are members of unpopular

> groups or who are merely suspected of engaging in other crimes, without sufficient probable cause to arrest for the underlying crime. Id.p.1173.

This danger of arbitrary and discriminatory enforcement has been a factor in the invalidation of several curfew ordinances on vagueness grounds. Seattle v. Pullman, supra; Portland v. James, 251 Or.8, 444 P.2d 554(1968);Bykofsky v. Borough of Middletown, 401F.Supp. 1242(M.D.Pa.1975), (declaring ordinance partially invalid).

The vagueness of the Norwich curfew ordinance is such that the Norwich police have sometimes declined to make arrests under its terms, feeling that the nighttime activities of some minors are not objectionable, even though in violation of the ordinance. The effect of the ordinance's vagueness has been to create strong doubts in the minds of minor plaintiffs as to their ability to exercise their rights to make use of the streets and public places of Norwich. Plaintiff parents, unsure as to whether or not innocent nighttime conduct will be penalized, and fearful that their children will be arrested for presence on the streets after attending religious to social events, have been constrained by the chilling effect of the curfew ordinance.

III. THE CURFEW ORDINANCE IS UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS BECAUSE IT INFRINGES ON THE FUNDAMENTAL RIGHTS OF FREE SPEECH UNDER THE FIRST AMENDMENT.

A. THE ORDINANCE INFRINGES ON MINOR PLAINTIFFS' RIGHTS TO MAKE USE OF PUBLIC STREETS AND TO FREEDOM OF SPEECH, ASSEMBLY AND ASSOCIATION.

The right to make reasonable use of streets, parks, squares and other public areas and buildings is often taken for granted, but it is among the most fundamental of personal liberties, and is implicitly guaranteed by the due process clause of the Fourteenth Amendment. United States v. Wheeler, 254 U. S. 281(1920). As the United States Supreme Court has said in Hague v. Committee for Industrial Organization, 307 U.S. 496(1939), in an opinion by Mr. Justice Roberts:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens...
>
> Id.p.515

A restriction on the use of streets and other public areas necessarily results in a restriction on the rights to speak freely, to assemble peacably, to distribute and discuss the product of free press, and to associate freely. As the New York Court of Appeals has recognized, in a case which invalidated an ordinance prohibiting obstructions on streets and sidewalks:

> It is, of course, appropriate for municipalities

> to enact legislation designed to promote general convenience on public streets. On the other hand, streets have always been recognized as a proper place for the dissemination and exchange of ideas...Where a statute is couched in such broad language that it is subject to discriminatory application, the resulting infringement on the exercise of freedom of speech far outweighs the public benefit sought to be achieved While we are in sympathy with the general purpose of the statute involved in this case, its susceptibility to arbitrary enforcement and its use of total prohibition rather than reasonable regulation render it unconstitutional. People v. Katz, 21 N.Y.2d. 132,135 (1967).

See Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1,5(1964). See also NAACP v. Alabama, 377 U.S. 288(1964); NAACP v. Button, 371 U.S. 415,444-445(1963); Edwards v. South Carolina, 372 U.S. 229, 235(1963); Henry v. City of Rock Hill, 376 U.S. 776(1964).

Several cases have noted the adverse impact of curfew ordinances on these fundamental rights to make use of the public streets and to free speech, assembly and association. In a 1957 decision the District Court of Appeal for the Third District of California held a juvenile curfew ordinance unconstitutional as an unlawful invasion of personal rights and liberties. Alves v. Judicial District 306 P.2d 601 (1957):

> The general right of every person to enjoy and engage in lawful and innocent activity while subject to reasonable restriction cannot be completely taken away under the guise of police regulation. Any regulation to the contrary will be stricken down as an arbitrary invasion of the inherent personal rights and liberties of all citizens. Thus, since it cannot be said that prohibition against the mere presence of a minor on a street or in a public place between

> the designated hours for a purpose other than required by his business, or unless accompanied by a parent or guardian, has any real or substantial relationship to the primary purpose of the statute, it therefore constitutes an unlawful invasion of personal rights and liberties, and for that reason is unconstitutional... Id.p.605.

The Norwich ordinance has a particularly detrimental impact on all of these rights because it mandates a total prohibition of even the presence of minors in public areas for any reason whatsoever. It thus restricts minors not only from exercising political rights of free speech and assembly, but even personal rights of free association, privacy, and control of one's person. In Bykofsky v. Borough of Middleton, supra, the court upheld a juvenile curfew ordinance which allowed numerous exceptions, including, specifically, the exercise of first amendment rights, interstate travel, travel to school activities and employment, and "reasonable necessity." In view of these fairly generous exceptions, the court held that the curfew ordinance did not unduly restrict any fundamental rights and was a reasonable exercise of the police power. Other curfew ordinances which have been held valid have also included various exceptions. City of Eastlake v. Ruggiero, 220 N.E.2d. 126 (Ohio app.1966); In re C., 105 Cal.Rptr.113(Cal.App.1972); In re Carpenter,287 N.E.2d.399 (Ohio App.1972). Whether or not these decisions are correct, they are distinguishable from the instant case. In the City of Norwich there are no exceptions to the curfew ordinance. Rather, it is a blanket prohibition of all public activity by minors.

Minors cannot be denied fundamental rights merely because

they are below the age of majority. The United States Supreme Court often has emphasized that minors are protected by the rights guaranteed under the United States Constitution. As the court said in Tinker v. Des Moines Independent School District et al.:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect... 393 U.S. 503,511(1969).

Rejecting the argument that the State's parens patriae status eliminated the need for procedural safeguards at juvenile criminal proceedings and despite the State's contention that it could be trusted to seek only the child's best interest in such proceedings, the Supreme Court emphasized that "...neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1,13 (1967). The Court in Gault specifically refused to outline all the details of the constitutional requirements of a juvenile's relationship with the State. It did, however, condemn past failures to observe fundamental requirements of due process in cases involving juveniles and blamed such failures as the cause for instances of unfairness. The justices observed that:

> ...Certainly [the extent of recidivism among juvenile offenders] and the high crime rate among juveniles...could not lead us to conclude that the absence of constitutional protections reduces crime or that the juvenile justice system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders. Id.p.22.

Specifically in reference to the rights of juveniles, the Gault Court stressed the principle that:

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the power which the State may exercise... Id.p.20.

Since its landmark decision in Gault, the court has reaffirmed the rights of juveniles in several contexts. Tinker v. Des Moines Independent School District, supra, (symbolic speech); Breed v. Jones, 421 U.S. 519,(1975) (double jeopardy); Goss v. Lopez, 419 U.S. 565 (1975) (notice and hearing for school suspension); In re Winship, 397U.S. 358(1970)(proof beyond reasonable doubt for juvenile conviction).

Following the lead of the Tinker decision, the U. S. Court of Appeals for the Seventh Circuit held that the Constitution protects minors as well as adults from arbitrary and unjustified governmental rules. Breen v. Kahl, 419 F.2d 1034, cert. denied, 398 U.S. 937 (1969). The U. S. Court of Appeals for the Fifth Circuit has held that, as with adults, the freedom of expression guaranteed by the First Amendment cannot be abridged by state officials unless necessitated by a legitimate state interest. Burnside v. Byars, 363 F.2d 744 (1966). At least one court has extended this reasoning to invalidate a curfew ordinance. Re Doe,513 P.2d 1385 (Haw.1973).

Plaintiffs maintain that whenever such legislation has been enacted and juveniles are classified differently because of their age, the purpose of such legislation has been to protect the young person from society's dangers and not to protect society from juvenile misconduct. A seller of alcoholic beverages may be arrested for

selling liquor to a minor; the minor is not arrested for the sale. Plaintiffs further contend, and will argue more fully below, that the City of Norwich curfew ordinance bears no relationship to the special needs of juveniles, advances no legitimate state interest, and places unreasonable restrictions on the exercise of minor plaintiff's fundamental constitutional rights.

B. THE ORDINANCE INFRINGES ON ADULT PLAINTIFFS' RIGHTS TO FAMILY AUTONOMY AND PRIVACY AND TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In our society, it is generally the parent who has the right and duty to guide the child to mature and productive adulthood. The state may not interfere with the parent's decisions in this regard except to protect other vital public interests. Minor details such as how late a child stays out at night are simply not the business of the state, unless parental responsibility is totally abdicated, a situation covered by neglect statutes. Roe v. Wade, 410 U.S.113 (1973); Stanley v. Illinois, 405 U.S.645(1972); Cleveland Board of Education v. LaFleur, 414 U.S. 632(1974); Wisconsin v. Yoder, 406 U.S. 205(1972); Pierce v. Society of Sisters, 268 U.S. 510(1925); Meyer v. Nebraska, 262 U.S. 390(1923).

The ordinance at issue completely usurps this fundamental right. It imposes an arbitrary and rigid regulation on family life, without allowing for parental discretion in any degree. In addition to its invasion of family rights, the ordinance infringes on the adult plaintiffs' rights to due process of law because it imposes criminal liability on them which is so sweeping and so unreasonable that de-

liberate compliance is a near impossibility. Their liability does not depend on a showing of any active conduct, or even a showing of negligence or consent. In order to comply with the ordinance, a parent would presumably be required to be the minor's jailer during curfew hours, and even then would be criminally responsible if the child "escaped" close supervision. Moreover, the parent is required to chauffeur his or her child to school and social activities, to jobs, across the street to a neighbor's house, either that or keep the child at home.

Even with the exercise of reasonable supervision by a conscientious parent, if his or her child is apprehended on the street after curfew hours, for any reason at all, the parent is criminally liable and subject to a fine. In effect, the parent is punished solely because of his or her status as a parent, without regard to any conduct, whether passive or active, negligent or vigilant. This offends the Eighth Amendment prohibition against cruel and unusual punishment. Robinson v. California, 370 U.S.660(1972).

It also offends basic notions of due process fairness. It imposes strict criminal liability for conduct which may well be innocent upon persons who do not engage in the conduct and are not completely able to control it. Such broad and unreasonable regulation, as discussed above, results inevitably in discriminatory and arbitrary enforcement. Papachriston v. City of Jacksonville, supra.

It is a fundamental notion of criminal law that one may not be penalized for the acts of others, unless he is in some way responsible for an act, by active or passive conduct. Parental re-

sponsibility for the acts of juveniles is imposed in New York in §260.10(2) of the Penal Law, which provides that a person is guilty of endangering the welfare of a child when:

> Being a parent, guardian or other person legally charged with the care and custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child", a "neglected child", a "juvenile delinquent", or "a person in need of supervision", as those terms are defined in articles ten and seven of the Family Court Act. (emphasis added)

This statute is a much less serious intrusion on family autonomy, only requiring parents to exercise reasonable diligence. Reasonable diligence does not mean, because it could not mean, twenty-four hour surveillance and control, which would be mandated by the Norwich ordinance.

C. THE ORDINANCE IS NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST.

The defendants assert that the purpose of the curfew ordinance is to "control the presence of juveniles in public places at nighttime with the attendant risk of mischief," and to "promote the safety and good order of the community by reducing the incidence of juvenile criminal activity". See Defendants' Memorandum in Opposition to Motion for Summary Judgment, p.2.

It has been held by the U. S. Supreme Court that only a compelling state interest in regulating a subject within a state's constitutional power to regulate can justify limiting first amendment freedoms. NAACP v. Button, 371 U.S. 415(1963); or the right

to family autonomy and privacy. Roe v. Wade, 410 U.S. 113(1973). A compelling state interest is precisely what it says, one that is necessary to public safety and welfare. Korematsu v. United States, 323 U.S. 214(1944). Whatever may be Norwich's interest in so invidiously discriminating against its young people, it is certain that this interest is far from compelling.

The purpose of the curfew ordinance, although clouded in vague terms of ending juvenile crime, actually is aimed at a less commendable, more disturbing goal. The ordinance simply provides a means for the arrest of a juvenile, whether or not guilty of any crime, and the imposition of fines on his or her parents by police authorities unwilling to respect the requirements of constitutional criminal procedure in the pursuit of the young people who actually do commit crimes.

In striking down a vagrancy statute, the New York Court of Appeals held that the statute's application to the plaintiff constituted an unconstitutional deprivation of due process of law. Fenster v. Leary, 20 N.Y.2d 309,282 N.Y.S.2d 739(1967). The Court said:

> ..[The statute] constitutes an overreaching of the proper limitations of the police power in that it unreasonably makes criminal and provides punishment for conduct (if we can call idleness conduct) which in no way impinges on the rights or interests of others and which in no way has been demonstrated to have anything more than the most tenuous connection with prevention of crime and preservation of the public order...other than, perhaps as a means of harassing, punishing or apprehending suspected criminals in an unconstitutional fashion. Id.p.309.

The ordinance at issue in this case is similarly unjusti-

fiable because, rather than narrowly defining the limits of nighttime activity so that basic First Amendment rights could be exercised, it provides an absolute prohibition against all nighttime conduct of juveniles, innocent or otherwise, without the presence of a parent or guardian. In areas such as child labor regulation, the limitations are on adult conduct which control the evil to be avoided. In the case of the Norwich curfew ordinance, however, the control is on juvenile conduct and bears only the most tenuous relationship to the evil sought to be avoided.

The character of juvenile crime is in no substantial way different from that of adult crime, yet adults are not prohibited from being on the streets. The Norwich curfew ordinance treats young people differently from adults in order to prevent conduct which is in no way related to a juvenile's special needs, age, or physical and emotional attributes. Clearly, a statute which imposed a curfew on poor people, in order to reduce "the attendant risk of mischief", would be constitutionally invalid, even though it is known that lower income people commit a disproportionate share of street crimes. Such an ordinance would be invalid, with or without a showing of its effectiveness, because it is simply too sweeping a method to accomplish a specific and legitimate purpose, i.e., the prevention of crime.

> [I]f there are other reasonable ways to achieve these [the State's] goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Dunn v. Blumstein, 405 U.S. 330(1972). NAACP v. Button, supra.

The City of Norwich does have other reasonable ways to

deal with the problem of juvenile delinquency. Adequate provisions already exist in the laws dealing directly with juvenile crime and delinquency. See New York Family Court Act §§711 et seq. (McKinney 1969); New York Penal Law §260.10(2)(McKinney 1969).

In formulating its ordinance the City of Norwich has created an activity "being upon the streets", which is legal if committed by a nineteen year old who may, in fact, be a menace to society, but illegal if committed by a twelve year old visiting her grandmother. It is a "crime" which is not harmful to others, not harmful to the accused" and, in fact, harmful only to the United States Constitution.

CONCLUSION

For the foregoing reasons, the Norwich curfew ordinance should be [illegible]ered unconstitutional.

Chapter 26

CURFEW

[HISTORY: Adopted by the Common Council of the City of Norwich 6-10-20 as Ordinance VI of the General Ordinances of the City of Norwich. Amendments noted where applicable.]

§ 26-1. Hours of curfew. [Amended 3-13-44, 5-8-56]

All children under the age of seventeen (17) years are hereby forbidden to be upon the streets or in any public places or buildings of the City of Norwich, after 11:00 in the evening Sunday, Monday, Tuesday, Wednesday and Thursday, and 12:00 midnight on Friday and Saturday, unless accompanied by the parent, guardian or other adult person having care and custody of the minor.

§ 26-2. Parents and guardians. [Amended 3-13-44, 5-8-56]

All parents or any person having the care and custody of any child under the age of seventeen (17) years are hereby forbidden to permit such child or children to be upon the streets or in any of the public buildings or places of the city after the hours above mentioned unless such child is accompanied by said parent, guardian or other adult person having the care and custody of the minor.

§ 26-3. Violations and penalties. [Amended 3-13-44, 5-8-56]

Any parents, guardians or relatives violating the provisions of this section will be punished by a fine of not more than twenty-five dollars ($25.) for each separate offense, and each violation of this section[1] shall constitute a separate offense.

[1] Editor's Note: Refers to §§ 26-1 and 26-2.